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IN THE

Supreme Court of the United States

October Term, 1930.

No. 520.

LEWIS-SIMAS-JONES COMPANY,
Petitioner,

v.

SOUTHERN PACIFIC COMPANY,
Respondent.

MOTION OF THE AMERICAN CYANAMID COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE.

ROBERT E. QUIRK,
Counsel for American Cyanamid Company, as Amicus Curiae.

March 31, 1931.

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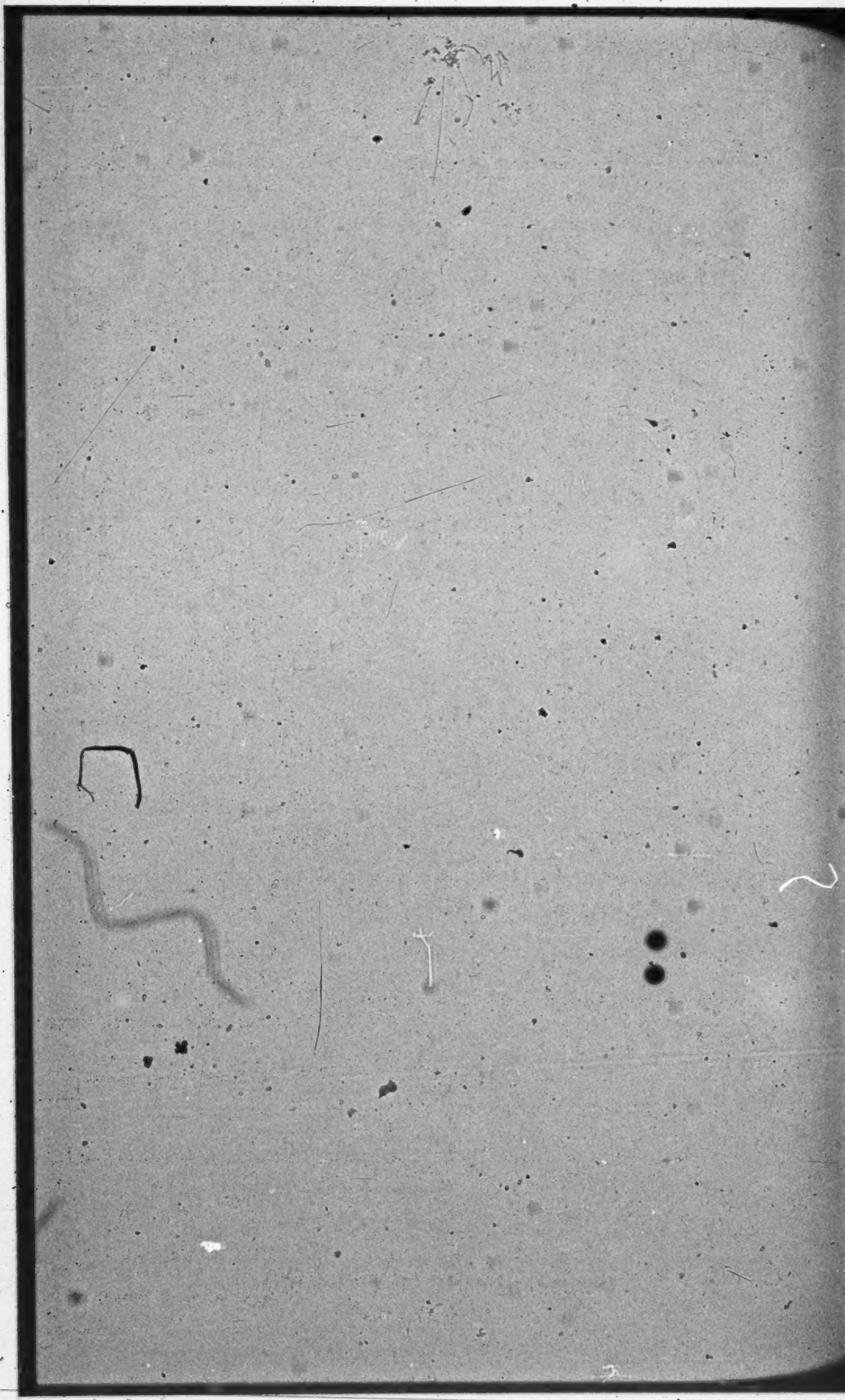

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LEWIS-SIMAS-JONES COMPANY,
Petitioner,

v.

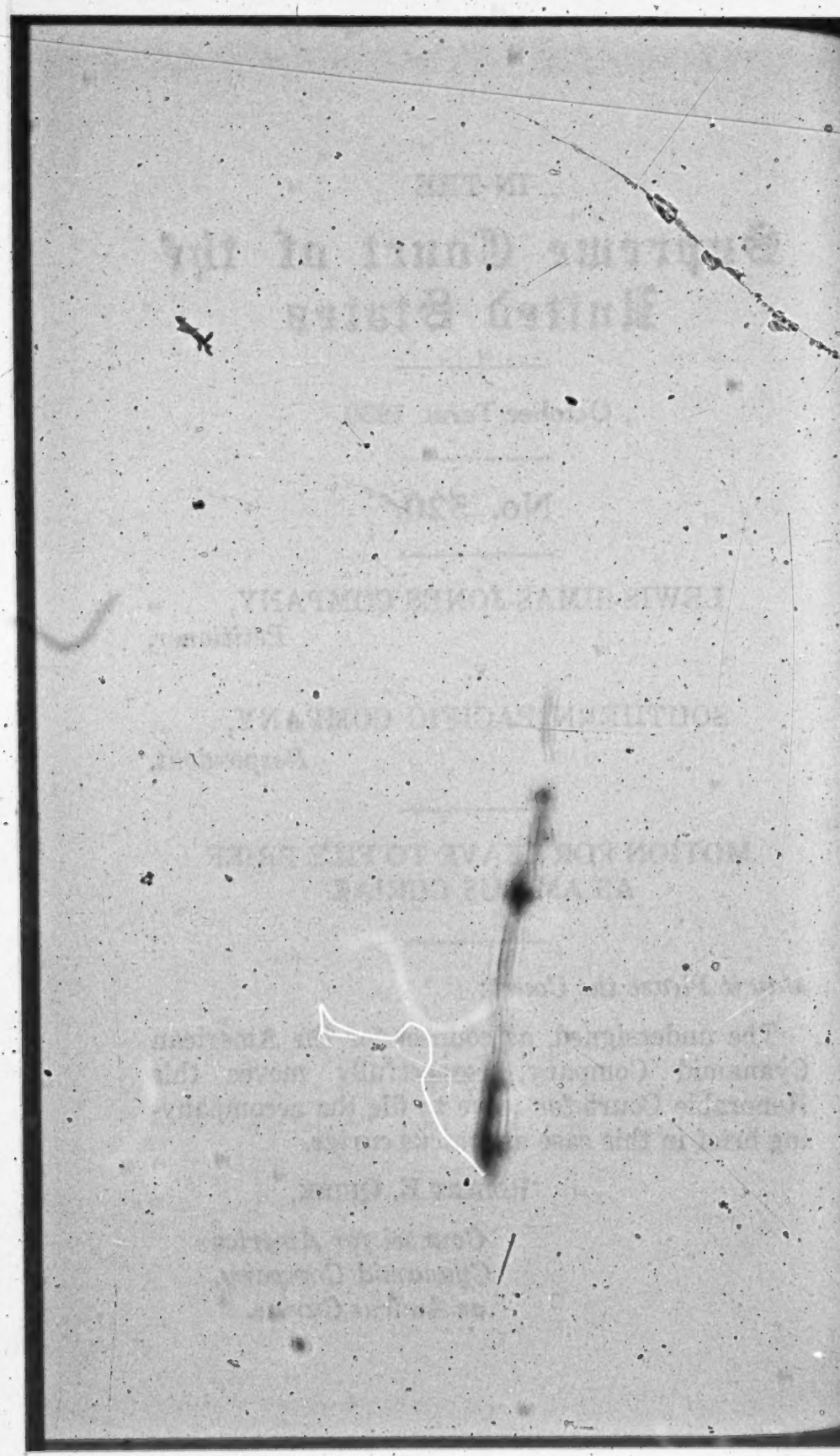
SOUTHERN PACIFIC COMPANY,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

May it Please the Court:

The undersigned, as counsel for the American Cyanamid Company, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae.*

ROBERT E. QUIRK,
Counsel for American Cyanamid Company, as Amicus Curiae.



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IN THE

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October Term, 1930.

No. 520.

LEWIS-SIMAS-JONES COMPANY,
Petitioner,

v.

SOUTHERN PACIFIC COMPANY,
Respondent.

BRIEF OF AMERICAN CYANAMID COMPANY AS AMICUS CURIAE.

PRELIMINARY STATEMENT.

The American Cyanamid Company, a corporation of the State of Maine, owns and operates a plant at Niagara Falls, Ont., about one mile from the international border at which it manufactures cyanamid and crude cyanide which are marketed

chiefly in the United States and are shipped to points within the United States on joint rates concurred in by railroads within Canada and railroads within the United States. Most of the raw products used by the American Cyanamid Company are shipped from points within the United States. This company is not directly interested in the rates and charges which are the subject matter of this suit, but it has a vital and continuing interest in the principle of law involved.

The decision of the District Court of Appeals of California in the case at bar, reported in 289 Pac. 643, by an erroneous construction of the statute and of the decision of this Court in *News Syndicate Co. v. N. Y. C.*, 275 U. S. 179, reversed an order of the Interstate Commerce Commission which was based upon an interpretation of the Interstate Commerce Act applied by that Commission to numerous similar cases for more than twenty years.

STATEMENT OF THE CASE.

The petitioner filed a complaint with the Interstate Commerce Commission against the Southern Pacific Company, the respondent, in which it assailed as unreasonable in violation of the Interstate Commerce Act the rates and charges exacted by the respondent upon carload shipments of cow peas which moved from Navojoa, Mexico, in conjunction with the Southern Pacific Railroad

Company of Mexico, and the respondent, through Nogales, Ariz., the border point, to San Francisco, Calif., as through shipments on through bills of lading issued by the initial carrier at Navojoa, Mexico. The respondent and the Southern Pacific Railroad Company of Mexico maintained a joint through rate of $1.33 per 100 pounds, which was filed and published with the Interstate Commerce Commission. The respondent exacted charges from petitioner on the basis of that rate.

The complaint alleged that the rate of $1.33 per 100 pounds was unjust and unreasonable to the extent it exceeded 94 cents per 100 pounds. The Commission found that the charges collected on the basis of the rate of $1.33 were unjust and unreasonable to the extent they exceeded the charges that would have been applicable at the rate of 94 cents per 100 pounds and awarded damages in a sum equal to the difference in the charges collected and the charges that would have been collected at the reasonable rate. Respondent declined to pay the award. Whereupon petitioner filed a suit against respondent in the Superior Court of the City and County of San Francisco under authority of Section 16 (2) of the Interstate Commerce Act, 41 Stat. L. 491, to recover on the award made by the Commission.

In the proceeding before the Commission respondent moved to dismiss the complaint upon the ground that the Commission was without juris-

dition, which motion was denied by the Commission.

In the trial court respondent did not deny the allegations of facts set up by petitioner but it did renew its plea that the Commission was without jurisdiction to make the order sued upon. The only fact pleaded by respondent which now appears to be material, is the allegation in its amendment to the answer (R. 5, 6) that respondent

> "maintained a rate applicable on cow peas, carloads, from the said international boundary line at Nogales, Ariz., to San Francisco, Calif., which rate would have been applicable for the transportation within the United States of the shipments mentioned in the complaint had the consignors or owners elected to consign the same to said international boundary line and had thence reshipped said cow peas from said international boundary line to San Francisco; and that the Interstate Commerce Commission has not at any time found said local rate from the international boundary at Nogales, Ariz., to San Francisco, Calif., to be or to have been unjust or unreasonable, or otherwise in violation of law."

There was no allegation in the answer, as amended, that respondent maintained a reasonable rate or any rate applicable to the transportation as rendered within the United States of the shipments of cow peas which moved on through bills of lading as though shipments from Navojoa through the port of Nogales to San Francisco.

The trial court found that the respondent maintained and published a rate of $1.145 per 100 pounds on carload shipments of cow peas originating at Nogales, Ariz., and destined to San Francisco, Calif.; that this rate was applicable to carload shipments of cow peas originating at the point where the lines of the Southern Pacific Railroad Company of Mexico and respondent touched the international boundary line at Nogales and destined to San Francisco; that this rate was likewise applicable upon carload shipments of cow peas loaded into cars at any point upon or adjacent to the boundary line within the limits of respondent's railroad yards at Nogales, Ariz., and destined to San Francisco; that the shipments in issue could have been transported by other means than by railroad to a point at the boundary line and there loaded into cars for movement over respondent's lines; that the rate applicable on shipments from such point upon the boundary line to San Francisco was the rate of $1.145; that that rate was reasonable and lawful for application upon carload shipments of cow peas from Nogales, Ariz., to San Francisco; and that the Interstate Commerce Commission had made no finding and had no evidence before it regarding the reasonableness of the rate of $1.145. Upon these premises the trial court concluded as a matter of law that the Commission was without jurisdiction. (R. 66 to 69).

On appeal to the District Court of Appeals of California, First Appellant District, that judgment was affirmed. 289 Pac. 643. The petitioner then applied to the Supreme Court of California for a hearing in accordance with the laws of that state, which application was denied.

ARGUMENT.

Summary of Argument.

Our argument will rest mainly upon three points:

(1) The decision of the court below is contrary to and in conflict with the applicable statutes as well as the decision of this Court in *News Syndicate Co. v. N. Y. C.*, 275 U. S. 179.

(2) The decision of the court below is contrary to and in conflict with the interpretation of the Interstate Commerce Act as applied by the Interstate Commerce Commission in numerous cases over a period of more than twenty years.

(3) The jurisdiction of the Interstate Commerce Commission over the subject matter is clear and the construction of the statute as applied by the Commission in this instance is correct and in accordance with the construction placed upon the statute by the Commission, upheld in *News Syndicate Co. v. N. Y. C.*, 275 U. S. 179.

Statutes Relied Upon.

The relevant parts of the statutes relied upon are printed in the appendix to this brief.

Point 1.

The decision of the court below is contrary to and in conflict with the applicable statutes as well as the decision of this Court in *News Syndicate Co. v. N. Y. C.*, 275 U. S. 179.

The court below, after discussing the decision of this Court in the *News Syndicate case*, found:

> In the present case respondent maintained and published a rate as required by the act on shipments from the international boundary at Nogales, Arizona, to San Francisco, which rate was not found to be unreasonable by the commission. The appellant was not compelled to pay the joint through rate by reason of any violation of the act on the part of respondent. The jurisdiction of the commission to award damages must be predicated upon a violation of the act and where there is no evidence to show that there has been such violation, the commission is without jurisdiction to make an award of damages.

One of the major purposes of the Interstate Commerce Act is to establish certainty and uniformity in the application of the rates, practices and charges of common carriers subject to the

act. *Texas & Pacific Rwy. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426.

It is settled law that under the Interstate Commerce Act there can be but one lawful rate applicable to commerce subject to that Act; *Baltimore & O. S. W. R. Co. v. Settle*, 260 U. S. 166; *Charles B. Justice Co. v. Holton I. R. Co.*, 153 I. C. C. 673; *Atlantic Fish Co. v. Canadian N. Rwy.*, 148 I. C. C. 533; *Kanotex Refining Co. v. A. T. & S. F. Ry. Co.*, 146 I. C. C. 495; and that a rate once lawfully established continues to be the legal rate until legally cancelled. *Transfer of Passengers Through New York and Newark*, 165 I. C. C. 497; *Brown Paper Mills Co. v. Inland Waterways Corp.*, 156 I. C. C. 339. It is also settled that a tariff lawfully filed with the Commission, plus the statute, has the force and effect of a statute. *Republic Coal Co. v. C. St. P. M. & O. Ry. Co.*, 85 I. C. C. 331.

Petitioner's complaint before the Commission assailed the charges which respondent compelled it to pay on the through shipments as made. In that complaint it was not concerned with and did not assail rates and charges which might have been applicable and which might have been exacted by respondent had different shipments been made. The Commission did not decide and was not called upon to decide by the issues raised whether the rate from Nogales, Ariz., to San Francisco, Calif., applicable on shipments from Nogales was just and reasonable because (a) that question was

not in issue before the Commission, and (b) the issue before the Commission was whether or not the charges exacted by respondent from petitioner under the joint rate of $1.83 applicable to the transportation service rendered on the through shipments as made from Navojoa, Mexico, to San Francisco were unjust and unreasonable, and if unjust and unreasonable whether the petitioner was damaged by the tort committed by respondent.

The court below erred (1) in finding that the petitioner was not compelled to pay the joint through rate (because respondent did not plead in its answer or otherwise that the rate maintained from Nogales, Ariz., to San Francisco was applicable to the shipments as made); and (2) in failing to find that the Commission had jurisdiction to determine that the joint rate applicable to the shipments as made and exacted by respondent was unjust and unreasonable and to award the damages resulting from this tort.

The court below implied that under the Interstate Commerce Act shippers have a choice of rates. There can only be one lawful rate applicable to particular commerce between particular points under the Interstate Commerce Act. Shippers are not in position to elect which of two or more rates may be applied to particular commerce. Under that Act it is the duty of carriers to collect and of shippers to pay the lawful applicable charge. In this instance the petitioner paid what the respondent demanded in freight charges

and on complaint before the Commission alleged that those charges and not other charges were unjust and unreasonable. Section 1 (5) of the Interstate Commerce Act provides that all *charges* made for any service *rendered* or *to be rendered* in the transportation of property or in connection therewith shall be just and reasonable. The charges here assailed were for services rendered by respondent in respect to through shipments from Navojoa, Mexico, to San Francisco, Calif. The Commission found those charges to have been unjust and unreasonable and awarded damages for that violation of the Act.

The Court below proceeded upon the erroneous assumption that because the respondent published and maintained a rate on carload shipments of cow peas applicable to shipments from Nogales, Ariz., to San Francisco, Calif., which was not alleged to be or found to be unreasonable, the respondent met its full duty under the Act, and by holding that the shipper could have obtained the use of that rate if it had billed the shipments in question to Nogales and had rebilled them from that point to San Francisco. In this view the court below appears to have relied upon the decision of this Court in the *News Syndicate case*, 275 U. S. 179. It will be presently shown that the court below misapplied that decision.

In the *News Syndicate case* the Circuit Court of Appeals certified four questions to this Court for consideration and decision of the cause there

before the court. In that case the Commission found certain joint rates on newsprint paper from Thorold, Ont., to New York City, to have been unreasonable and awarded damages to the complainant. The defendants refused to pay the award. Whereupon the complainant there sued to recover on the order of the Commission. The questions certified to this Court in the *News Syndicate case*, 275 U. S. 179, were:

> "1. Where a railroad of the United States and a railroad of the Dominion of Canada unite in the publication of a joint through rate from a point within the Dominion of Canada to a point within the United States, the rate covering transportation both in Canada and in the United States, has the Interstate Commerce Commission of the United States jurisdiction, on complaint of a shipper or consignee made against the United States railroad alone, to determine the reasonableness of such joint through rate?
>
> 2. Where a shipper or consignee of freight shipped to it at a destination in the United States from such point in the Dominion of Canada has paid at destination to the United States railroad the full published joint through freight rate thereon, has the Interstate Commerce Commission, upon a finding by it that such joint through rate was unreasonable and unjust, but in the absence of a finding that the charges for the transportation in so far as it took place within the United States were unjust and unreasonable, jurisdiction to make an order for

the payment of damages to such shipper or consignee in the amount that the entire transportation charges on the basis of the joint through freight rate exceeded the charges which would have been assessed on the basis of the joint through freight rate found by the Commission to have been reasonable?

3. When the Interstate Commerce Commission had made such an order against the United States carrier alone for the payment of damages arising from its finding of the unreasonableness of such published joint through rate, can a suit thereon, under section 16, of the Interstate Commerce Act, be maintained solely against the United States carrier?

4. Did the district court err in sustaining the demurrer to said petition?"

The Court answered the questions categorically as follows:

"Question 1 is answered 'Yes, for the ascertainment of damages.'
Question 2 is answered 'Yes.'
Question 3 is answered 'Yes.'
Question 4 is not answered."

The answers to the certified questions are unqualified authority for the jurisdiction exercised by the Commission in the instant case. But the court below appears to have been influenced by certain statements made by this Court in its preliminary discussion of these questions rather than by

the categorical answers to the questions made by this Court.

In its discussion of these questions in the *News Syndicate case*, this Court said:

> "(1) As to Question 1.—The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York City. Section 1 (1) and (2). It was the duty of defendants in error to establish just and reasonable rates for that service. Section 1 (5); section 6 (1) and (7). They failed to make or publish any rate applicable to that part of the transportation. Section 8 makes them liable for damages sustained in consequence of such failure. Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error. Its right to reparation does not depend upon the amounts retained by defendants in error pursuant to agreed divisions. Louisville & Nashville R. Co. v. Sloss-Sheffield Co., 269 U. S. 217, 231, 46 S. Ct. 73, 70 L. Ed. 242. Their breach of the statutory duty was a proximate cause of the losses complained of. The failure to establish rates covering the transportation from the international boundary contravened the provisions of the act and compelled plaintiff in error to pay the through charges complained of. The Commission had jurisdiction to determine whether plaintiff in error was entitled to an 'award of damages under the provisions of this act for a violation thereof.' Section 16 (1). And it was the duty of the Commission

to ascertain the damages sustained. It is obvious that, in the ascertainment of damages, the Commission had jurisdiction to determine the reasonableness of the charges exacted.

(2) As to Question 2.—The Commission did not specifically find whether the portions of the charges fairly attributable to transportation within the United States were excessive to the extent that the through rates were found unreasonable. While the findings seem to indicate that the Commission held the entire excess should be charged against the American lines, we shall consider the question on the basis therein stated. The Canadian lines furnishing the transportation from Thorold to the international boundary were not before the Commission and were not sued. The defendants in error participated in the making of the through rate and actually collected the excessive charges. By their failure to comply with the act, plaintiff in error was compelled to pay charges based on the through rates. On the facts stated, the Commission was authorized to hear the complaint, section 13 (1); and had jurisdiction to make the order, section 16 (1). The question should be answered in the affirmative.

(3) As to Question 3.—The statement of the case and what has been said as to questions 1 and 2 make it plain that this question should be answered in the affirmative.

(4) As to Question 4.—Section 239 authorizes the Circuit Court of Appeals to certify to this court any questions or propositions of law concerning which instructions are desired

for the proper decision of the cause.' It is well settled that this statute does not authorize the lower court to make, or require this court to accept, a transfer of the case. The inquiry calls for decision of the whole case. It is not specific or confined to any distinct question or proposition of law, and therefore need not be answered. The Folmina, 212 U. S. 354, 363, 29 S. Ct. 363, 53 L. Ed. 546, 15 Ann. Cas. 748; United States v. Bailey, 9 Pet. 267, 273-274, 9 L. Ed. 124; United States v. Mayer, 235 U. S. 55, 66, 35 S. Ct. 16, 59 L. Ed. 129, and cases cited."

This Court said nothing in its discussion of the certified questions that is authority for the finding made by the court below. While the question whether in the *News Syndicate case* the carriers published or maintained a rate from the international border was not embodied in any of the questions certified, this Court said in discussing this point that

"The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York City. Section 1 (1) and (2). It was the duty of defendants in error to establish just and reasonable rates for that service. Section 1 (5); section 6 (1) and (7)."

and that

"They failed to make or publish any rate *applicable* to that part of the transportation.

> * * * The failure to establish rates covering the transportation from the international boundary contravened the provisions of the act and compelled plaintiff in error to *pay the through charges* complained of. * * * It is obvious that, in the ascertainment of damages, the Commission had jurisdiction to determine *the reasonableness of the charges exacted.*" (Italics ours).

At another point, in discussing question 1, the Court said

> "Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error."

The jurisdiction exercised by the Commission in the instant case in its interpretation of the statute squares with the conclusions of this Court in the *News Syndicate case.* It is settled law that the charging of an unreasonable rate is a tort and that in awarding damages the Commission exercises a quasi-judicial function. *Southern Pacific Co. v. Darnell-Taenzer Co.*, 245 U. S. 531, 534; *Baer Bros. v. Denver & R. G. R. R. Co.*, 233 U. S. 479, 486. See also *Louisville & Nashville R. R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 295 Fed. 53, 59, 269 U. S. 217, 232; and *International Nickel Co. v. Dir. Gen.*, 66 I. C. C. 627, 628. In the *Sloss-Sheffield case* this Court held that the liability of a carrier for exacting unlawful charges is joint and several and that the liability arises

out of the wrongful exaction from the shipper, not out of the unlawful receipt or unjust enrichment by the carrier and, further, that every carrier which participated in the infliction of this wrong is liable *in solido* like every other joint tort feasor.

In the *News Syndicate case* this Court, after reciting that the Interstate Commerce Act applies to the lines that carried and to the transportation from the international boundary, stated that it was the duty of the carriers to establish just and reasonable rates applicable "*for that service.*" In the instant case respondent did not publish or maintain a rate applicable to the transportation service performed within the United States on through shipments as made from Navojoa, Mexico, through the border point to San Francisco.

We submit that the court below made its fundamental error in holding that the respondent met its full duty by having maintained a rate from Nogales which would have been applicable to shipments of cow peas originating at that point or which may have been rebilled from that point to San Francisco. The court below also erred in the view that even if, assuming that the rate from Nogales to San Francisco was applicable to the shipments, that fact would relieve the respondent from liability as a tort feasor in failing to apply that rate and in exacting from petitioner an unreasonable charge and that that fact would also deprive the Commission of jurisdiction to deter-

mine the question. The court below assumed that because in the *News Syndicate case* this Court held that the railroads there involved had committed a tort by failing to establish a reasonable rate applicable to that part of the transportation service which took place within the United States, no tort could be committed by the railroads in respect to the joint rate itself. This is a *non sequitur*.

In dealing with this question in *Cyanamid and Cyanide from Niagara Falls*, 155 I. C. C. 488, at page 491, which is the most comprehensive decision of the Commission since the decision of this Court in the *News Syndicate case*, the Commission said:

> "It must be borne in mind, however, that the questions certified to the court and its answers were addressed to a suit for damages based upon a reparation order made and entered by us. The holding that the United States carriers in that case had committed a tort in failing 'to make or publish any rate *applicable* to that part of the transportation' (which took place within the United States) *is not conclusive that they could commit no tort in respect of a joint international rate.* To find otherwise would be to free from any regulation every joint international rate now participated in by the United States lines, and to render impotent our jurisdiction even over that portion of the transportation which 'takes place within the United States.' And this would be true not

alone as to the 'reasonableness' of such rates, which was the only question considered by the court, but to questions of undue prejudice and unjust discrimination as well." (Italics ours).

This is an apt statement of the Commission's construction of the decision of this Court in the *News Syndicate case* as applied to a situation where that decision was of importance. In dealing with the question in that case, the Commission also stated that

> "If the duty of the United States carriers to publish rates to and from the international boundary, referred to by the court, is exclusive and all embracing, then it must follow that participation in a joint international rate is *ipso facto* unlawful. We do not so construe the law. Moreover, such construction would not square with the statement of the court that 'had the through rate been just and reasonable, no damages would have resulted to plaintiff in error.' It is impossible to conceive of a 'just and reasonable' rate as the product of a tortious act."

In the *Cyanamid case* the railroads contended that under the decision of this court in the *News Syndicate case* the Commission did not have the power to determine whether or not a rate was unreasonable except for the ascertainment of damages. The Commission held otherwise and said

> "The fact that a portion of the transportation takes place within a foreign country might make proof of unlawfulness more difficult. *But proof should not be confused with responsibility.*" (Italics ours).

Where as in the instant case the Commission exercises a quasi-judicial function to determine whether the charges exacted by a common carrier under a joint international rate were unjust and unreasonable, the fact that certain of the railroads which participate in the joint rate are located in a foreign country is not material or controlling. As this Court said in the *News Syndicate case*

> "The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York City."

The carriers within the United States which participate in a rate that is unjust and unreasonable are joint tort feasors, and are jointly and severally liable for damages resulting therefrom.

The finding of the lower court, if sustained, is tantamount to holding that carriers subject to the Interstate Commerce Act may be relieved from the duties imposed by that Act by the mere form in which they elect to publish rates. Otherwise expressed, it means that a carrier may exact unreasonable charges under a joint rate and escape the jurisdiction of the Commission and of the

courts as to responsibility for its act as a joint tort feasor, merely by publishing a rate from the international boundary, irrespective of the question whether that rate is used for the services rendered. Neither the Interstate Commerce Act nor the decision of this Court in the *News Syndicate case* may properly be construed to bring about such a result.

The respondent has sensed the seriousness of such consequences by the rather vague contention that the decision of the court below should not be construed as holding that international joint through rates are entirely free from the restraints of Section 1 (5) of the Interstate Commerce Act. If the Interstate Commerce Commission has no jurisdiction to determine in a case of this kind whether the carrier subject to its jurisdiction committed a wrong prohibited by the Interstate Commerce Act in joining in an unreasonable international joint rate because the same carrier published a rate applicable to shipments rebilled at the border, it is difficult to conceive under what circumstances the Commission could assert jurisdiction over the joint rates. The truth is that if the decision of the court below is sustained the respondent will be free from the restraints imposed upon carriers by Section 1 (5) of the Interstate Commerce Act as to the joint rate charged which the Commission found unreasonable.

In *United States v. Pacific & Arctic R. & N. Co.*, 228 U. S. 87, the Court dealt with the lawfulness

of an agreement between connecting railroads, steamship carriers and a wharfage company to establish through routes and joint rates for transportation between Puget Sound and points in Alaska and Canada. The case arose on indictments charging violation of the anti-trust laws and unjust discrimination in wharfage charges. The combining companies there established through routes and joint rates and by agreement fixed so-called local rates substantially higher than the railroads' share of the through rate. In this way they forced all shippers to ship by the through route and joint rates. This Court held that there was a violation of the anti-trust act and the Interstate Commerce Act but that the question of unjust discrimination under the Interstate Commerce Act could not be redressed by the courts in either a criminal or civil proceeding in advance of action by the Commission. The Court also held that the fact that part of the transportation route was outside of the United States did not prevent the application of the Federal statutes, and made the following comment in respect to the contention of the defendants that as part of the transportation route was outside the United States the Federal laws do not apply:

> "This is but saying that laws have no extraterritorial operation; but to apply the proposition as defendants apply it would put the transportation route described in the indictment out of the control of either Canada

> or the United States. These consequences we cannot accept. * * * If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations."

The principle announced by this Court in the *Pacific & Arctic case* is applicable to the instant case because here as in that case the respondent carrier whose property is in the United States joined a foreign corporation in maintaining a joint rate and applied that rate in exacting charges from petitioner, which the Commission found to be unjust and unreasonable.

That traffic transported on through bills of lading between points in the United States and points in a foreign country is subject to the provisions of the Interstate Commerce Act is settled. *Armour & Co. v. United States*, 209 U. S. 56. In *C., N. O. & T. P. R. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, the validity of an order of the Commission relating to transportation from Cincinnati to destinations in Georgia was involved. One of the defendants, the Georgia Railroad Company, with lines wholly within Georgia, assessed local charges for services within Georgia and contended that this transportation being wholly within the state did not come within the scope of the Interstate Commerce Act. This

Court held that the Georgia Railroad, having elected to enter into the carriage of interstate freight and thus subjected itself to the control of the Interstate Commerce Commission, it would not be competent for that company to limit that control in respect to foreign traffic to certain points on its road and to exclude other points.

In *Illinois Central R. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, the Court considered the validity of an order of the Commission. The rate involved applied from shipping points in Louisiana, Mississippi and Alabama to Ohio River crossings and was a separately stated rate factor to apply on lumber transported beyond the crossings. With respect to the Commission's power over the through charges, the Court said at page 465:

> "It is said that it was error to hold the advance unreasonable and unjust because the charges made on lumber to Cairo and other points on the Ohio River 'are mere divisions of through rates, the justness of which neither the Interstate Commerce Commission nor the Circuit Court has any jurisdiction to determine.' Indeed, it is said, to do so is an exercise of a legislative function. We think the contention is in effect answered by *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184; 40 L. ed. 935; 5 Inters. Com. Rep. 391; 16 Sup. Ct. Rep. 700. If the contention is intended to be as extensive as its words seemingly make it, it would withdraw from the supervision of

the Interstate Commerce Commission and from the courts every shipment over two or more railroads. There necessarily must be some apportionment of the rates between such roads, and whether the advance should be made in the rates over one road or the other, or in the rates over all, can make no difference. *In other words, it is competent for the Commission or the courts to consider the through rate, however composed.*" (Italics ours).

Point 2.

The decision of the court below is contrary to and in conflict with the interpretation of the Interstate Commerce Act as applied by the Interstate Commerce Commission in numerous cases over a period of more than twenty years.

For more than twenty years the Interstate Commerce Commission has exercised jurisdiction to determine whether joint international rates between points in the United States and points in either Canada or Mexico, were unjust and unreasonable and during that period it has been its constant practice to determine whether such rates are unjust and unreasonable and to award damages where the circumstances warrant such action. It was an order of this character that reached the Supreme Court in the *News Syndicate case. Black Horse Tobacco Co. v. I. C. R. R.*, 17 I. C. C. 588; *Tennessee Extract Corp. v. L. & N. R. R. Co.*,

128 I. C. C. 709; *Ontario Paper Co. v. C. N. Rys.*, 95 I. C. C. 66; *Grasselli Chemical Co. v. B. & O.*, 89 I. C. C. 383; *American Cyanamid Co. v. Dir. Gen.*, 69 I. C. C. 337; *American Cyanamid Co. v. Michigan Central* 51 I. C. C. 236; *Spanish River Pulp & Paper Mills v. A. & W. Rwy. Co.*, 113 I. C. C. 343; *International Nickel Co. v. Dir. Gen.*, 66 I. C. C. 627; *Lake Superior Paper Co. v. Dir. Gen.*, 61 I. C. C. 709; *Minnesota and Ontario Paper Co. v. N. P. Rwy.*, 66 I. C. C. 571; *Commercial Club of Omaha v. B. & O.*, 52 I. C. C. 225; *Bloedel-Donovan v. Director General*, 68 I. C. C. 95; *Monarch Paper Co. v. Can. Pac.*, 53 I. C. C. 620.

Since the decision of this Court in the *News Syndicate case* handed down in November, 1927, the Commission has continued to assert jurisdiction to determine whether joint international rates are just and reasonable. *Cyanamid & Cyanide from Niagara Falls*, 155 I. C. C. 488; *Atlantic Fish Co. v. C. N. R.*, 148 I. C. C. 533; *Charles B. Justice Co. v. Holton I. R. Co.*, 153 I. C. C. 673; *San Diego Oil Products Corp. v. Holton I. R. Co.*, 164 I. C. C. 505.

This Court has held in many cases that a definitely settled administrative construction of a statute by those charged with its enforcement is entitled to the highest respect and that if such a construction is acted on for a number of years it will not be disturbed except for cogent reasons. *United States v. Missouri Pacific R. R. Co.*, 278 U. S. 269; *Logan v. Davis*, 233 U. S. 613.

The construction of the statute upon which the order of the Commission here involved was based, has been uniformly applied by it over a long period of time, at least twenty years. This, as the Court has recognized, is a fact entitled to the highest respect. In addition, it is significant that in the only case which reached this Court where this construction of the statute was challenged, the Court upheld the Commission.

The court below apparently seized upon certain parts of the language in the preliminary discussion in the opinion of Mr. Justice Butler respecting the questions certified to the court in the *News Syndicate case* as authority for the proposition that because the opinion said in the discussion of the certified questions that the railroads there committed a wrong in failing to establish and publish applicable rates from the international boundary, they could not be guilty of a wrong in respect to the joint rate itself. The jurisdiction of the Commission exercised over a long period of years and upheld by this Court in the *News Syndicate case* should not be reversed on the strained construction of certain parts of the language of the opinion of the court in discussing the questions certified in the *News Syndicate case.* The categorical answer to the questions by the Court disposes of the jurisdictional point here involved and is a complete answer to respondent's contention. On these reasons alone the decision of the court below should be reversed. *Non quod dictum est, sed quod factum est, inspicitur.*

Point 3.

The jurisdiction of the Interstate Commerce Commission over the subject matter is clear and the construction of the statute as applied by the Commission in this instance is correct and in accordance with the construction placed upon the statute by the Commission, which this Court upheld in *News Syndicate Co. v. N. Y. C.* 275 U. S. 179.

The jurisdiction of the Interstate Commerce Commission over the subject matter is beyond question. The respondent is subject to the Interstate Commerce Act and the commerce is subject to that Act.

The amendment to Section 1 (1) of 1920 which added the words "but only in so far as such transportation or transmission takes place within the United States" is of no special significance, although the court below appears to have accepted respondent's contention that the jurisdiction of the Commisison was thereby restricted. The language of this Court in *United States v. Pacific & Arctic R. & N. Co.*, 228 U. S. 87, already referred to, in respect to a somewhat similar contention there made that "this is but saying that laws have no extraterritorial operation" is, we think, applicable here. If the so-called restricting language were excluded from the Act the Commission would still be without extraterritorial powers. The Commission is not required to exercise extraterri-

torial powers to determine in a given case whether a carrier subject to the jurisdiction of the Act is liable for damages as a joint tort feasor for committing a wrong forbidden by that Act.

Under Section 1 (5) it is the duty of common carriers to establish and maintain just and reasonable charges for any service *rendered* or *to be rendered.* Under Section 6 (1) it is the duty of carriers to file, print and keep open to public inspection schedules showing the rates and charges for transportation between different points. Common carriers are made liable for damages for violations of the Act by Section 8, and the Commission has authority to award damages for violations of the Act under Section 16 (1).

Section 1 (5) of the Interstate Commerce Act provides that "all charges made for any service rendered or to be rendered in the transportation of passengers or property * *" by carriers subject to the Act shall be just and reasonable and that every unjust and unreasonable charge is unlawful. This requirement is independent of Section 6 of the Act which provides that charges must also be published between different points. The charge exacted by respondent in the instant case for the transportation service rendered was based upon the joint rate which the Commission found unreasonable. This suit does not involve rates or charges on transportation services *to be rendered* from Nogales or elsewhere. To hold, as the court below did, that the respondent met its full duty

under the Act by maintaining a rate from Nogales which might be applicable to a shipment originating at that point or to a shipment originating in a foreign country and rebilled from that point where the carrier actually exacted charges based upon another rate, means that in such circumstances the carrier may with impunity join carriers in foreign countries in maintaining and applying unreasonable charges. The ruling of the court below, if correct, also means that the act of the respondent in exacting unreasonable charges under a joint international rate puts the transaction out of the control of the United States and of the power of the Commission by the mere expedient on the part of the carrier in publishing a rate from the border point, even though not applied to the service rendered. This allows mere form to control the important question of jurisdiction.

We do not believe that this Court held or meant to hold in the *News Syndicate case* that where a carrier exacts unreasonable charges based upon a joint rate, it may escape liability as a tort feasor by setting up a plea in a given case that it maintained a rate from the border which might have been applicable to shipments originating at or rebilled from that point. In the *Pacific and Arctic Railroad and Navigation Company case*, where contentions similar to those made by respondent here were before this Court, it said "these consequences we cannot accept," and in the *News*

Syndicate case, the Court said that "had the through rate been just and reasonable, no damages would have resulted to plaintiff in error." This language negatives the idea that by publishing a rate from a border point irrespective of whether it is applied, carriers in this country are immune from the duty imposed on them by Section 1 (5) of the Act of exacting just and reasonable charges for services rendered irrespective of the manner of publication or of determining the charge.

The fact that a corporation operating in this country joins a foreign carrier in maintaining and applying a joint rate may make it more difficult to prove that the rate exacted was unlawful. But, as stated by the Commission in the *Cyanamid case*, proof should not be confused with responsibility. In the instant case the question before the Commission was whether or not the charges that were exacted by respondent for the services rendered were unreasonable as alleged, not whether some other charge, which might have been exacted on other shipments in respect to services to be rendered, were unreasonable. Otherwise stated, the question before the Commission was whether or not what the respondent did violated the Interstate Commerce Act, not what it might have done under different circumstances. The view taken by the Commission in the *Cyanamid case*, already referred to, that the holding of this Court in the *News Syndicate case* that the carriers there committed a tort in failing to make or publish any

rate applicable to the transportation service from the border is not conclusive that the carriers could commit no tort in respect to the joint rate itself, is sound and conforms to general principles applicable to tort feasors.

We do not believe that this Court will hold that the question of the power of the Commission as to charges exacted by carriers subject to the Interstate Commerce Act for services rendered in connection with commerce subject to that Act may turn on the mere manner in which the railroad elects to publish and maintain rates and charges. In the *News Syndicate case* the failure of the carriers to establish just and reasonable charges applicable to that part of the transportation service within the United States was held by the Court to violate the Interstate Commerce Act. When the Court said in that case that it was the duty of the carriers to establish just and reasonable rates applicable to the service of transportation within the United States it meant that the carrier would meet its duty under the Act only if it established and *applied* rates from the border to the transportation service actually performed. It did not mean to say, as contended by respondent here, that a carrier could escape liability as a tort feasor from participation in and the use of an unreasonable joint rate by the mere gesture of publishing a paper rate from the border point which the carrier neither applies nor pretends to apply to through international commerce such as is here involved.

CONCLUSION.

For the reasons stated the decision of the court below should be reversed. It erred in holding (a) that the petitioner was not compelled to pay the joint through rate by reason of any violation of the Act by respondent, (b) that the Interstate Commerce Commission was without jurisdiction over the subject matter, (c) that the respondent did not violate the Interstate Commerce Act, and (d) it was influenced by what the court said in its discussion of the certified questions in the *News Syndicate case* instead of by what the court did in that case.

Respectfully submitted,

ROBERT E. QUIRK,
Counsel for American Cyanamid Company, as Amicus Curiae.

March 31, 1931.

APPENDIX.

Statutes Relied Upon.

The Interstate Commerce Act:

Section 1 (1): (41 Stat. L. 474)

"That the provisions of this Act shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or

(c) The transmission of intelligence by wire or wireless;—from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States."

Section 1 (5): (41 Stat. L. 474)

"All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. * * *".

Section 6 (1): (34 Stat. L. 584; 41 Stat. L. 483)

"That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also

state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. * * *"

Section 6 (7): (34 Stat. L. 584)

"No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 8: (24 Stat. L. 379)

"That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

Section 16 (1): (34 Stat. L. 584; 41 Stat. L. 491)

"That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."